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Conflict Minerals Case Continues as Appellants File Supplemental Brief

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In late December, the National Association of Manufacturers, the Chamber of Commerce and the Business Roundtable (the Appellants) filed a supplemental brief in the ongoing conflict minerals case, which we previously discussed **here**. The brief is in response to the Panel order granting rehearing in November to address certain discrete matters, which we listed **here**.

At issue is whether the SEC's conflict minerals rule is a "purely factual and uncontroversial" disclosure requirement within the meaning of the Zauderer precedent. The Appellants argue that the statement of whether products are DRC conflict free is not purely factual and uncontroversial because: (a) the statement constitutes an ideological judgment implying that those companies unable to confirm the source of their minerals bear responsibility for the Congo war; (b) the statement is highly misleading and susceptible to interpretations that are not factually accurate because it suggests an association with the armed conflict; and (c) the terminology forces companies to adopt a view, which policy experts disagree about, that the mineral trade is responsible for the conflict.

The Appellants state that they do not dispute that the descriptions of the scope and result of the due diligence investigations are factual in nature, as the SEC had described in its brief, but rather disagree that those facts then end up meaning that a product is not conflict free. They argue that this runs afoul of the First Amendment by requiring private speakers to parrot a government's chosen words and characterization of a policy issue.

The Appellants believe that the term "conflict free" renders a value judgment and requires issuers to confess to morally tainted products. The breadth of the requirement forces companies to make the statement even if the connection to the DRC is remote, or, possibly, there is no connection, making the statement misleading. In addition, the government's identified means of informing consumers about a product is not itself a purpose of the statute, which is to reduce conflict in the DRC.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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